

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 337 Public-Private Partnerships

SPONSOR(S): Williams and others

TIED BILLS: **IDEN./SIM. BILLS:** SB 576

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Government Operations Subcommittee	12 Y, 0 N	Meadows	Williamson
2) Government Operations Appropriations Subcommittee			
3) State Affairs Committee			

SUMMARY ANALYSIS

Public-private partnerships are contractual agreements formed between a public agency and a private sector entity that allow for greater private sector participation in the delivery and financing of public buildings and infrastructure projects. Through these agreements, the skills and assets of each sector, public and private, are shared in delivering a service or facility for the use of the general public. In addition to the sharing of resources, each party shares in the risks and rewards potential in the delivery of the service or facility.

This bill creates the Florida Public-Private Partnership Act to facilitate public-private partnerships to construct public-purpose projects as an alternative to the Consultants' Competitive Negotiation Act. The bill specifies the requirements for such partnership, and creates a Public-Private Partnership Advisory Commission.

The bill has an unknown fiscal impact on state and local governments.

The bill provides an effective date of July 1, 2012.

The bill appears to raise constitutional concerns. See Section III.A.2. of the analysis.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Public-Private Partnership

Overview

Public-private partnerships (PPP) are contractual agreements formed between a public agency and a private sector entity that allow for greater private sector participation in the delivery and financing of public building and infrastructure projects.¹ Through these agreements, the skills and assets of each sector, public and private, are shared in delivering a service or facility for the use of the general public.² In addition to the sharing of resources, each party shares in the risks and rewards potential in the delivery of the service or facility.³

There are different types of PPPs with varying levels of private sector involvement. The most common is called a Design-Build-Finance-Operate (DBFO) transaction, where the government grants a private sector partner the right to develop a new piece of public infrastructure.⁴ The private entity takes on full responsibility and risk for delivery and operation of the public project against pre-determined standards of performance established by government. The private entity is paid through the revenue stream generated by the project, which could take the form of a user charge (such as a highway toll) or, in some cases, an annual government payment for performance (often called a “shadow toll” or “availability charge”). Any increases in the user charge or payment for performance typically are set out in advance and regulated by a binding contract.⁵

Another PPP procurement process is the Unsolicited Proposal Procurement Model (UPPM). This allows for the receipt of unsolicited bids from private entities to contract for the design, construction, operation, and financing of public infrastructure.⁶ Generally, the public entity requires a processing or review fee to cover costs for the technical and legal review.⁷

Florida Department of Transportation Public-Private Partnership

The Florida Department of Transportation (FDOT) currently has a public-private partnership program in place.⁸ The Florida Legislature declared that there is a public need for rapid construction of safe and efficient transportation facilities for the purpose of travel within the state, and that it is in the public's interest to provide for the construction of additional safe, convenient, and economical transportation facilities.⁹

Florida law provides that a private transportation facility constructed pursuant to s. 334.30, F.S., must comply with all requirements of federal, state, and local laws; state, regional, and local comprehensive plans; FDOT rules, policies, procedures, and standards for transportation facilities; and any other conditions that FDOT determines to be in the public's best interest.¹⁰

¹ See the Federal Highway Administration, United States Department of Transportation, Innovative Program Delivery webpage, available at: <http://www.fhwa.dot.gov/ipd/p3/defined/index.htm> (last visited on January 25, 2012).

² See generally The National Council for Public-Private Partnerships webpage, *How PPPs Work*, available at: <http://ncppp.org/howpart/index.shtml#define> (last visited on January 25, 2012).

³ *Id.*

⁴ See the Oregon Department of Transportation, The Power of Public-Private Partnerships, available at: <http://www.oregon.gov/ODOT/HWY/OIPP/docs/PowerofPublicPrivate050806.pdf> (last visited January 25, 2012).

⁵ *Id.*

⁶ See *Innovative Models for the Design, Build, Operation and Financing of Public Infrastructure*, John J. Fumero, at 3 (on file with the Government Operations Subcommittee).

⁷ *Id.*

⁸ See s. 334.30, F.S.

⁹ Section 334.30, F.S.

¹⁰ Section 334.30(3), F.S.

Current law allows FDOT to advance projects programmed in the adopted 5-year work program using funds provided by public-private partnerships or private entities to be reimbursed from FDOT funds for the project as programmed in the adopted work program.¹¹ In accomplishing this, FDOT may use state resources to participate in funding and financing the project as provided for under FDOT's enabling legislation for projects on the State Highway System.¹²

FDOT may receive or solicit proposals and, with legislative approval as evidenced by approval of the project in the department's work program, enter into agreements with private entities, or consortia thereof, for the building, operation, ownership, or financing of transportation facilities.¹³ If FDOT receives an unsolicited solicitation or proposal, it is required to publish a notice in the Florida Administrative Weekly and a news paper of general circulation stating that FDOT has received the proposal and it will accept other proposals for the same project.¹⁴ In addition, FDOT requires an initial payment of \$50,000 accompany any unsolicited proposal to cover the costs of evaluating the proposal.¹⁵

Current law governing FDOT's PPP provides for a solicitation process that is similar to the Consultants' Competitive Negotiation Act¹⁶. FDOT may request proposals from private entities for public-private transportation projects.¹⁷ The partnerships must be qualified by FDOT as part of the procurement process outlined in the procurement documents.¹⁸ These procurement documents must include provisions for performance of the private entity and payment of subcontractors, including surety bonds, letters of credit, parent company guarantees, and lender and equity partner guarantees.¹⁹ FDOT must rank the proposals in the order of preference.²⁰ FDOT may then begin negotiations with the top firm. If that negotiation is unsuccessful, FDOT must terminate negotiations and move to the second-ranked firm, and if unsuccessful again, move to the third-ranked firm.²¹ FDOT must provide independent analyses of the proposed PPP that demonstrates the cost effectiveness and overall public benefit prior to moving forward with the procurement and prior to awarding the contract.²²

Current law authorizes FDOT to use innovative finance techniques associated with PPP's, including federal loans, commercial bank loans, and hedges against inflation from commercial banks or other private sources.²³ PPP agreements under s. 334.30, F.S., must be limited to a term not to exceed 50 years. In addition, FDOT may not utilize more than 15 percent of total federal and state funding in any given year to fund PPP projects.²⁴

Procurement of Personal Property and Services

Chapter 287, F.S., regulates state agency²⁵ procurement of personal property and services. The Department of Management Services (department) is responsible for overseeing state purchasing activity including professional and contractual services as well as commodities needed to support

¹¹ Section 334.30(1), F.S.

¹² *Id.*

¹³ *Id.*

¹⁴ Section 334.30(6)(a), F.S.

¹⁵ See Fla. Admin. Code R. 14-107.0011

¹⁶ See s. 287.055, F.S.

¹⁷ Section 334.30(6)(a), F.S.

¹⁸ Section 334.30(6)(b), F.S.

¹⁹ Section 334.30(6)(c)

²⁰ See s. 334.30(6)(d), F.S. In ranking the proposals, the FDOT may consider factors that include, but are not limited to, professional qualifications, general business terms, innovative engineering or cost-reduction terms, finance plans, and the need for state funds to deliver the project.

²¹ Section 334.30(6)(d), F.S.

²² Section 334.30(6)(e), F.S.

²³ Section 334.30(8), F.S.

²⁴ Section 334.30(13), F.S.

²⁵ As defined in s. 287.012(1), F.S., "agency" means any of the various state officers, departments, boards, commissions, divisions, bureaus, and councils and any other unit of organization, however designated, of the executive branch of state government. "Agency" does not include the university and college boards of trustees or the state universities and colleges.

agency activities, such as office supplies, vehicles, and information technology.²⁶ The Division of State Purchasing in the department establishes statewide purchasing rules and negotiates contracts and purchasing agreements that are intended to leverage the state's buying power.²⁷

Current law requires contracts for commodities or contractual services in excess of \$35,000 to be procured utilizing a competitive solicitation process.^{28,29}

The Consultants' Competitive Negotiation Act

In 1972, Congress passed the Brooks Act (Public Law 92-582), which codified Qualifications-Based Selection (QBS) as the federal procurement method for design professional services. The QBS process entails first soliciting statements of qualifications from licensed architectural and engineering providers, selecting the most qualified respondent, and then negotiating a fair and reasonable price. The vast majority of states currently require a QBS process when selecting the services of design professionals.

Florida's Consultants' Competitive Negotiation Act (CCNA), was enacted in 1973,³⁰ to specify the procedures to follow when procuring the services of architects and engineers. The CCNA did not prohibit discussion of compensation in the initial vendor selection phase until 1988, when the Legislature enacted a provision requiring that consideration of compensation occur only during the selection phase.³¹

Currently, the CCNA specifies the process to follow when state and local government agencies procure the professional services of an architect, professional engineer, landscape architect, or registered surveyor and mapper.³² The CCNA requires that state agencies publicly announce, in a consistent and uniform manner, each occasion when professional services must be purchased for one of the following:

- A project, when the basic construction cost is estimated by the agency to exceed \$325,000.
- A planning or study activity, when the fee for professional services exceeds \$35,000.

The CCNA provides a two-phase selection process.³³ In the first phase, the "competitive selection," the agency evaluates the qualifications and past performance of no fewer than three bidders. The agency selects the three bidders ranked in order of preference that it considers most highly qualified to perform the required services. The CCNA requires consideration of several factors in determining the three most highly qualified bidders, including willingness to meet time and budget requirements; past performance; location; recent, current, and projected firm workloads; volume of work previously awarded to the firm; and whether the firm is certified as a minority business.³⁴

The CCNA prohibits the agency from requesting, accepting, and considering, during the selection process, proposals for the compensation to be paid. Current law defines the term "compensation" to mean "the amount paid by the agency for professional services," regardless of whether stated as compensation or as other types of rates.³⁵

In the second phase, the "competitive negotiation," the agency then negotiates compensation with the most qualified of the three selected firms. If a satisfactory contract cannot be negotiated, the agency

²⁶ See ss. 287.032 and 287.042, F.S.

²⁷ Chapter 287, F.S., provides requirements for the procurement of personal property and services. Part I of that chapter pertains to commodities, insurance, and contractual services, and part II pertains to motor vehicles.

²⁸ Section 287.057(1), F.S., requires all projects that exceed the Category Two (\$35,000) threshold provided in s. 287.017, F.S., to be competitively bid.

²⁹ As defined in s. 287.012(6), F.S., "competitive solicitation" means the process of requesting and receiving two or more sealed bids, proposals, or replies submitted by responsive vendors in accordance with the terms of a competitive process, regardless of the method of procurement.

³⁰ Chapter 73-19, L.O.F.

³¹ Chapter 88-108, L.O.F.

³² Section 287.055, F.S.

³³ Section 287.055(4) and (5), F.S.

³⁴ See s. 287.055(4)(b), F.S.

³⁵ Section 287.055(2)(d), F.S.

must then negotiate with the second most qualified firm. The agency must negotiate with the third most qualified firm if the negotiation with the second most qualified firm fails to produce a satisfactory contract. If a satisfactory contract cannot be negotiated with any of the three selected, the agency must begin the selection process again.

Procurement of Construction Services

Chapter 255, F.S., regulates construction services³⁶ for public property and publically owned buildings. The Department of Management Services is responsible for establishing, through administrative rules, the following:

- Procedures for determining the qualifications and responsibility of potential bidders prior to advertisement for and receipt of bids for building construction contracts;
- Procedures for awarding each state agency construction project to the lowest qualified bidder;
- Procedures to govern negotiations for construction contracts and modifications to contract documents when such negotiations are determined by the secretary of the Department of Management Services to be in the best interest of the state; and
- Procedures for entering into performance-based contracts for the development of public facilities when the Department of Management Services determines the use of such contracts to be in the best interest of the state.³⁷

State contracts for construction projects that are projected to cost in excess of \$200,000 must be competitively bid.³⁸ In addition, such projects must be advertised in the Florida Administrative Weekly at least 21 days prior to the bid opening.^{39,40} Counties, municipalities, special districts⁴¹, or other political subdivisions seeking to construct or improve a public building must competitively bid the project if the projected cost is in excess of \$300,000.⁴²

Effect of Proposed Changes

The bill creates the Florida Public-Private Partnership Act in chapter 287, F.S. (act) and provides legislative findings to support the need for public-private partnerships (PPP) in Florida.

Definitions

The bill provides for definitions to be used in the act. Included in the definitions are the terms:

- “Public entity” means the state and any agency or authority thereof; any county, city, or town and any other political subdivision of the state; any public body politic and corporate; or any regional entity that serves a public purpose.
- “Qualifying project” means any public-purpose facility or project, including a public school building and any functionally related and subordinate facility, including any stadium or other facility primarily used for school events; a building or facility that meets a public purpose and is developed or operated by or for any public entity; improvements, including equipment, of

³⁶ As defined in s. 255.072(2), F.S., “construction services” means all labor, services, and materials provided in connection with the construction, alteration, repair, demolition, reconstruction, or any other improvements to real property. The term “construction services” does not include contracts or work performed for the Department of Transportation.

³⁷ Section 255.29, F.S.

³⁸ See 60D-5.0073, F.A.C.; see also s. 255.0525, F.S.

³⁹ Section 255.0525(1), F.S.

⁴⁰ State construction projects that are projected to exceed \$500,000 are required to be published 30 days prior to bid opening in the Florida Administrative Weekly, and at least once in a newspaper of general circulation in the county where the project is located. See s. 255.0525(1), F.S.

⁴¹ As defined in s. 189.403(1), F.S., “special district” means a local unit of special purpose, as opposed to general-purpose, government within a limited boundary, created by general law, special act, local ordinance, or by rule of the Governor and Cabinet. The special purpose or purposes of special districts are implemented by specialized functions and related prescribed powers. For the purpose of s. 196.199(1), F.S., special districts must be treated as municipalities. The term does not include a school district, a community college district, a special improvement district created pursuant to s. 285.17, F.S., a municipal service taxing or benefit unit as specified in s. 125.01, F.S., or a board which provides electrical service and which is a political subdivision of a municipality or is part of a municipality.

⁴² See s. 255.20(1), F.S.

buildings to be principally used by a public entity; and water or wastewater management facility and other related infrastructure.

- “Responsible public entity” means an agency or institution of the state that has the authority to develop or operate a qualifying project.

Guidelines

Before requesting or considering a proposal for a qualifying project, the bill requires a responsible public entity to adopt and make publicly available guidelines that are reasonable, encourage competition, and guide the selection of projects under the purview of the responsible public entity. However, the responsible public entity does not have to follow the guidelines if the guidelines are not advantageous to such public entity.

Responsible Public Entities of the State

For a state agency that is a responsible public entity, the guidelines must include, but are not limited to:

- Opportunities for competition through public notice.
- Reasonable criteria for choosing among competing proposals.
- Suggested timelines for selecting proposals and negotiating an interim⁴³ or comprehensive agreement.⁴⁴
- Authorization for accelerated selection and review and documentation timelines for proposals involving a qualifying project that the responsible public entity deems a priority.
- Financial review and analysis procedures.
- Consideration of the nonfinancial benefits of a proposed qualifying project.
- A mechanism for the appropriating body⁴⁵ to review a proposed interim or comprehensive agreement prior to execution.
- Establishment of criteria for the creation of and the responsibilities of a public-private partnership oversight committee with members representing the responsible public entity and the appropriating body. If formed, the oversight committee must be an advisory committee to review the terms of any proposed interim or comprehensive agreement.
- Analysis of the adequacy of the information released when seeking competing proposals; and
- Establishment of criteria, key decision points, and approvals required to ensure that the responsible public entity considers the extent of competition before selecting proposals and negotiating an interim or comprehensive agreement.
- The posting and publishing of public notice of a private entity’s request for approval of a qualifying project.

The bill specifies that the notice must be published on the Internet, but it does not provide guidance as to the location on the Internet for publication.

Responsible Public Entities that are not the State

The bill also provides guidelines for a responsible public entity *that is not an agency or institution of the state*; however, this is in contradiction to the definition of “responsible public entity.” The guidelines may include the provisions previously discussed and must include a requirement that the responsible public entity engage the services of qualified professionals not otherwise employed by such responsible entity. The qualified professional must provide an independent analysis regarding the specifics, advantages, disadvantages, and the long and short-term costs of any request by a private entity for approval of a qualifying project. However, the governing body of the responsible public entity may determine that such analysis must be performed by employees of such responsible public entity. Qualified professionals may include an architect, professional engineer, or certified public accountant.

⁴³ The bill defines “interim agreement” to mean an agreement between a private entity and a responsible public entity that provides for phasing of the development or operation of a qualifying project. Such phases may include, but are not limited to, design, planning, engineering, environmental analysis and mitigation, financial and revenue analysis, or any other phase of the project that constitutes activity on any part of the qualifying project.

⁴⁴ The bill defines “comprehensive agreement” to mean the comprehensive agreement between the private entity and the responsible public entity.

⁴⁵ The bill defines “appropriating body” to mean the body responsible for appropriating or authorizing funding to pay for a qualifying project.

In addition, the guidelines must include a mechanism for the appropriating body to review a proposed interim or comprehensive agreement prior to execution.

Procurement Process

The bill provides that the Consultants' Competitive Negotiation Act, and any interpretations, regulations, or guidelines of the Department of Management Services, do not apply to the act. The bill provides an optional procurement process that the public entity may follow. It also provides that a public entity is not required to select the proposal with the lowest bid offer, but may use price as one consideration. Additionally, the bill encourages the public entity to consider private entities that will utilize local contractors and residents for the qualifying project. It does not provide for a process by which vendors may protest the solicitation.

Qualifying Projects

A responsible public entity may request proposals or invite bids from private entities for the development or operation of qualifying projects. A private entity may request the approval of a responsible public entity for a qualifying project. The private entity must accompany the request with the following information, unless waived by the responsible public entity:

- A topographical map.
- A description of the qualifying project.
- A statement providing the method the private entity will utilize to secure necessary property interests.
- Information relating to the current plans for the development of facilities or technology infrastructure to be used by a public entity that is similar to the qualifying project being proposed by the private entity, if any, of each affected local jurisdiction.
- A list of permits and approvals required.
- A list of public water or wastewater management facilities that will be crossed by the project.
- A statement setting forth the private entity's general plans for financing the project.
- The names and addresses of the persons who may be contacted for further information.
- User fees, lease payments, and other service payment over the term of the agreement.
- Any additional material and information that the responsible public entity may request.

Upon receipt of a proposal, the responsible public entity must determine whether to accept the proposal for consideration. The responsible public entity may charge a reasonable fee to cover the costs of processing, reviewing, and evaluating the request, including reasonable attorney fees and fees for financial, technical, and other necessary advisors or consultants.

The responsible public entity may reject any proposal initiated by a private entity at any time. If the responsible public entity does not accept the proposal, then the responsible public entity must return the proposal, including fees and documentation, to that private entity. This provision appears to conflict with the Public Records Act⁴⁶ and the Administrative Procedure Act (APA).⁴⁷ Once a proposal is submitted to a public entity it becomes a public record. In addition, it may be needed if the solicitation is challenged by a vendor under the APA.

The responsible public entity may approve the development or operation of an education facility, water or wastewater management facility and related infrastructure, technology infrastructure or other public infrastructure, or a government facility needed by a public entity as a qualifying project, or the design or equipping of a qualifying project so developed or operated, if certain conditions are met. Upon approval of a qualifying project, the responsible public entity must establish a date for the commencement of activities related to the qualifying project. Such approval is subject to entering into a comprehensive agreement with the private entity.

⁴⁶ See chapter 119, F.S.

⁴⁷ See chapter 120, F.S.

Agreements

Interim Agreement

The bill provides that before or in connection with the negotiation of a comprehensive agreement, the responsible public entity may enter into an interim agreement. The interim agreement may:

- Permit the private entity to commence activities for which it may be compensated related to the proposed qualifying project.
- Establish the process and timing of the negotiation of the comprehensive agreement.
- Contain any other provisions related to any aspect of the development or operation of a qualifying project.

Comprehensive Agreement

The bill provides that the private entity must enter into a comprehensive agreement with the responsible public entity before developing or operating the qualifying project. The comprehensive agreement must provide for:

- Delivery of maintenance, performance, and payment bonds and letters of credit in connection with the development or operation of the qualifying project.
- Review of plans and specifications for the project by the responsible public entity. This does not require the private entity to complete the design of the project prior to executing the comprehensive agreement.
- Inspection of the qualifying project by the responsible public entity.
- Maintenance of a policy or policies of public liability insurance.
- Monitoring the practices of the private entity to ensure the project is properly maintained.
- Reimbursement to be paid to the responsible public entity for services provided by that entity.
- Filing of financial statements on a periodic basis.
- Policies and procedures governing the rights and responsibilities of the responsible public entity and private entity in the event of a termination of the agreement or a material default.
- User fees, lease payments, or service payments as may be established by agreement of the parties.
- Duties of the private entity, including terms and conditions that the responsible public entity determines serve the public purpose of the project.

The comprehensive agreement may include:

- An agreement by the responsible public entity to make grants or loans to the private entity from amounts received from the federal, state, or local government.
- Provisions under which the responsible public entity agrees to provide notice of default and cure rights for the benefit of the private entity and the person specified therein as providing financing for the qualifying project. The provisions may include terms and conditions to which the private entity and the responsible public entity mutually agree, including provisions regarding unavoidable delays or a loan of public funds to the private entity to develop or operate one or more qualifying projects.
- Provisions where the authority and duties of the private entity must cease, and the qualifying project is dedicated to the responsible public entity or, if the qualifying project was initially dedicated by an affected local jurisdiction, to such local jurisdiction.

Notification of Local Jurisdictions

The bill requires any private entity requesting approval from, or submitting a proposal to, a responsible public entity to notify each affected local jurisdiction. The private entity must provide a copy of its request or proposal to that local jurisdiction. Each affected local jurisdiction that is not a responsible public entity for the respective qualifying project must, within 60 days after receiving such notice, submit in writing any comments it may have on the proposed qualifying project to the responsible public entity and indicate whether the facility is compatible with the local comprehensive plan, local infrastructure development plans, the capital improvements budget, or other government spending plan. The comments must be given consideration by the responsible public entity before entering a comprehensive agreement with a private entity.

Powers of the Private Entity

The bill provides that the private entity has the power to develop or operate the qualifying project and collect lease payments, impose user fees, or enter into service contracts in connection with the use of the qualifying project. In addition, the private entity has the ability to own, lease, or acquire any other right to use or operate the qualifying project. The private entity may determine the amounts and terms and conditions of the financing of the qualifying project. The bill also authorizes the private entity to make and enforce rules to the same extent as the public entity in regards to operating the qualifying project. It is unclear what is meant by “making” and “enforcing” rules.

Material Default

The bill provides for processes in the event there is a material default⁴⁸ by the private entity. If the private entity materially defaults, the responsible public entity may elect to assume the duties and responsibilities of the private entity of the qualifying project. In such case, it must succeed to all of the right, title, and interest in such qualifying project, subject to any liens on revenues previously granted by the private entity to any person providing financing.

A responsible public entity having the power of condemnation under state law may exercise the power of condemnation to acquire the qualifying project in the event of a material default by the private entity. Any person who has provided financing for the qualifying project, and the private entity, may participate in the condemnation proceedings with the standing of a property owner.

If a responsible public entity elects to take over a qualifying project, the responsible public entity may develop or operate the qualifying project, impose user fees, impose and collect lease payments, and comply with any service contracts as if it were the private entity. If the responsible public entity collects monies or fees from third parties, the fees would be considered just compensation for the qualifying project.

Federal, State, and Local Financing

The bill provides that the financing of the qualified project may be in such amounts or on such terms and conditions as agreed upon by the responsible public entity and the private entity. The private entity and the responsible public entity may propose to use any and all funding resources that may be available and may issue debt, equity, or other securities or obligations; enter into leases; access any designed trust funds; borrow or accept grants from any state infrastructure bank; and secure any financing with a pledge of, security interest in, or lien on, any or all of its property, including all of its property interests in the qualifying facility. The responsible public entity may take any action to obtain federal, state, or local assistance for a qualifying project that serves the public purpose of the act and may enter into any contracts required to receive such assistance.

Sovereign Immunity

The bill provides that sovereign immunity is not waived by the state, any responsible public entity, any affected local jurisdiction, or any officer or employee with respect to the qualifying project. In addition, it provides that cities, counties, and towns possess sovereign immunity with respect to the design, construction, and operation of the project.

Public-Private Partnership Advisory Commission

The bill creates the Public-Private Partnership Advisory Commission (commission). The commission is established to review and report the “implementation” of the Public-Private Partnership Act, and provide recommendations and revisions to further the PPP opportunities in the state. The membership consists of two members of the Florida House of Representatives, appointed by the Speaker of the House of Representatives; two members of the Florida Senate, appointed by the President of the Senate; and eight members appointed by the Governor. Members’ terms are for four years, except members of the House of Representatives and the Senate, who serve until the expiration of their terms in office or their successors qualify. The members of the commission must elect a chairperson and vice-chairperson.

⁴⁸ The bill defines “material default” to mean any default by the private entity in the performance of its duties that jeopardizes adequate service to the public from a qualifying project.

Members must hold public meetings at least quarterly or at the call of the chairperson. Members of the commission are entitled to per diem and travel expenses,⁴⁹ and the Executive Office of the Governor must provide the administrative support for the commission.

The commission is required to submit a report providing comments on the implementation of the act and recommendations for future revisions, beginning December 13, 2013, and each year thereafter.

B. SECTION DIRECTORY:

Section 1 creates s. 287.05712, F.S., to establish the Florida Public-Private Partnership Act.

Section 2 provides an effective date of July 1, 2012.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The fiscal impact on state government is unknown. See Fiscal Comments.

2. Expenditures:

The fiscal impact on state government is unknown. See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The fiscal impact on local governments is unknown. See Fiscal Comments.

2. Expenditures:

The fiscal impact on local governments is unknown. See Fiscal Comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may provide for more opportunities for the private sector to enter into contracts for construction services with the state and local governments.

D. FISCAL COMMENTS:

There is a fiscal impact to the state associated with the creation of the commission. Members appointed to the commission are entitled to per diem and travel expenses, as provided in s. 112.061, F.S.

The Department of Management Services also provided the following fiscal comments:

- The annual fiscal impact of this proposal is unknown due to the newness of the proposed process and the current trends and conditions of the national and state economies. The proposed language may be problematic in implementation and result in legal complications in future years. Other issues may result in complications related to delivery of project not within current statute and administrative guidelines. The process may result in unforeseen funding, delivery and utilization complexities as a result of agreements that are not currently in existence or vary from public entity to public entity.⁵⁰
- The expenditures for both the state and local government would be unknown. The expenditures would be based on currently unidentified agreements with public-private projects. State and

⁴⁹ See 112.061, F.S.

⁵⁰ *Id.* at 4.

local governments may need to establish new administrative units to implement the proposed process.⁵¹

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditure of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

Pledging Credit

The bill may implicate Article VII, s. 10 of the Florida Constitution. Article VII, s. 10 of the Florida Constitution places limits on the pledging of credit. The purpose of Article VII, s. 10 of the Florida Constitution is to prohibit state and local governments from becoming stockholders in or loaning their credit to aid any corporation, association, institution, or individual.⁵²

The bill permits private entities to issue debt, equity, or other securities and obligations or to secure financing with a pledge of security interest. It also permits the interests to be turned over to the state agency or local government, either voluntarily or by default. This ability of the private entity to issue debt, equity, or other securities and obligations and to secure financing, with a pledge of security interest, could implicate the constitutional prohibition on pledging credit if state and local governments are later subject to those terms and conditions.

Sovereign Immunity

Article X, s. 13 of the Florida Constitution provides that provisions may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating. Sovereign immunity is a doctrine that precludes the bringing of a suit against the government without its consent.⁵³ Sovereign immunity extends to all subdivisions of the state, including counties and school boards. Any waiver of sovereign immunity by a state or local government must be clear and unequivocal, it may not be inferred.⁵⁴ Express waiver of sovereign immunity by the state requires either a statutory or constitutional provision.⁵⁵

Although not specifically provided in statute, the state is vulnerable to suit over contractual disputes. The Florida Supreme Court has held, "statutes authorizing government agencies to enter into contracts constitute a waiver of sovereign immunity for actions arising under those contracts."⁵⁶

The bill specifically provides that the act does not waive the sovereign immunity of the state, any responsible public entity, any affected local jurisdiction, or any officer or employee thereof. However, the bill allows a responsible public entity to assume the duties and responsibilities of the private entity and, as such, the responsible public entity would gain all of the right, title, and interest in the project and would be subject to any liens that may have been placed on the project. This would

⁵¹ *Id.*

⁵² See State v. Housing Finance Authority of Polk County, 376 So.2d 1158, 1160 (Fla. 1979). See also 1997 Fla. Op. Atty. Gen. 34, available online at: <http://myfloridalegal.com/ago.nsf/Opinions/23922B3CC09BB5D9852564B80057BF82> (last visited February 1, 2012).

⁵³ Black's Law Dictionary, 1396 (6th ed. 1990).

⁵⁴ See City of Key West v. Florida Keys Community College, 2012 WL 126858 (Fla. 3d DCA 2012).

⁵⁵ See Pan-Am Tobacco Corp. v. Department of Corrections, 471 So.2d 4 (Fla. 1984).

⁵⁶ See Florida Department of Environmental Protection v. ContractPoint Florida Parks, LLC, 986 So.2d 1260, 1268 (Fla. 2008); See also Substantive Analysis of HB 337, Department of Financial Services, January 26, 2012, at 2 (on file with the Government Operations Subcommittee).

appear to impose liability on the state on any outstanding financial interests on the property that the private entity previously secured.

Holding Dual Office Roles

The bill could implicate Article II, s. 5 of the Florida Constitution. Article II, s. 5 of the Florida Constitution provides:

No person holding any office of emolument under any foreign government, or civil office of emolument under the United States or any other state, shall hold any office of honor or of emolument under the government of this state. No person shall hold at the same time more than one office under the government of the state and the counties and municipalities therein, except that a notary public or military officer may hold another office, and any officer may be a member of a constitution revision commission, taxation and budget reform commission, constitutional convention, or statutory body having only advisory powers.

The bill creates the Public-Private Partnership Advisory Commission (commission). It provides that membership of the commission must consist of two members of the House of Representatives and two members of the Senate. The commission is established to review and report on the “implementation” of the Public-Private Partnership Act, and to provide recommendations and revisions to further the PPP opportunities in the state. It is unclear whether the commission is supposed to monitor or oversee the implementation of the act. If the commission is supposed to oversee the implementation of the act then one could argue that the commission’s role is more than advisory in nature. If the commission’s role is more than advisory, the members of the House of Representatives and the Senate could be deemed to be elected officials holding dual office roles.

B. RULE-MAKING AUTHORITY:

The bill requires agencies to adopt guidelines to provide a process to guide the selection of proposals from private entities; however, agencies do not have to follow those guidelines.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Drafting Issues: Responsible Public Entity

The bill defines “responsible public entity” to mean “an agency or institution of the state that has the authority to develop or operate a qualifying project. Throughout the act, the bill refers to a “responsible public entity,” a “responsible public entity that is an agency or institution of the state,” and a “responsible public entity that is not an agency or institution of the state.” As such, the sponsor may want to consider an amendment to address the inconsistencies regarding the use of the term “responsible public entity.”

Drafting Issue: Comprehensive Agreement

Lines 447-455 of the bill provide a provision that may be included in a comprehensive agreement. However, it provides that the provision is “including but limited to”. It appears the word “not” was omitted from the phrase. As such, the sponsor may want to consider an amendment to clarify the phrase.

Other Comments: Qualifying Project

The bill defines “qualifying project” to include equipment. According to the Department of Financial Services, including “equipment” in the description of “qualifying project” appears to conflict with s. 287.063, F.S., relating to commodity contracts requiring deferred-payment and preaudit reviews. The Chief Financial Officer (CFO) of Florida is responsible for pre-audit of all commodity contracts, including the leasing and purchasing of equipment, that require deferred payments and the payment of interest.⁵⁷ The bill does not provide a process for the CFO to perform this pre-audit.⁵⁸

⁵⁷ See s. 287.063(2)(a), F.S.

⁵⁸ See Substantive Analysis of HB 337, Department of Financial Services, January 25, 2012, at 1 (on file with the Government Operations Subcommittee).

Other Comments: User Fees

The bill does not appear to provide sufficient guidance as to how to structure the user fees that may be collected by the private entity for use of the facility. The user fees may be agreed to in the comprehensive agreement, but it does not provide guidelines for setting those fees. Parameters may need to be established to help guide the responsible public entity and the private entity when establishing appropriate user fees.

Other Comments: Public-Private Partnership Advisory Commission

The bill creates a Public-Private Partnership Advisory Commission (commission). Current law defines a “commission” to mean:

[U]nless otherwise required by the State Constitution, means a body created by specific statutory enactment within a department, the office of the Governor, or the Executive Office of the Governor and exercising limited quasi-legislative or quasi-judicial powers, or both, independently of the head of the department or the Governor.⁵⁹

Current law provides that a council or advisory council is defined as an advisory body created by specific statutory enactment and appointed to function on a continuing basis for the study of the problems arising in a specified functional program or area of state government and to provide recommendations and policy alternatives.⁶⁰ It appears that designating the commission as a council would be more appropriate if the commission is truly an advisory body.

Other Comments: Department of Financial Services

The Department of Financial Services provided the following comments:

- HB 337 new s. 287.05712(6)-(7), F.S., allow a handoff of duties from the private entity to the public agency (line 457). These impose on the agency contractual liabilities and provisions that do not meet the agency’s statutory accountability and liability limitation requirements. The interim contract (line 365-75) appears to be without competition, and is not sufficiently limited in scope (as in 489.145, F.S., technical feasibility study) to prevent subsequent obligations on the agency, e.g., to terms not negotiated by the agency (line 495).⁶¹
- HB 337 new s. 287.05712(10)(e), F.S., allows agencies to collect money from third parties that the private entity was given power to impose . . . if the agency takes over, which fees are “considered just compensation for the qualifying project.” This means there is no financial disincentive for non-performance.⁶²
- HB 337 new s. 287.05712(10), F.S., allows the facility owner-agency, if with condemnation powers, to condemn land for the private entity’s project if the private entity defaults (line 537) but private entity acts as landowner . . . landowner gets paid for taking by agency if private entity defaults . . .⁶³
- HB 337 new s. 287.05712(14): The Chief Financial Officer should be on the commission. The CFO responsible for pre-audit of deferred payment contracts per s. 287.063, F.S.⁶⁴

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.

⁵⁹ Section 20.03(10), F.S.

⁶⁰ See s. 20.03(8), F.S.

⁶¹ Substantive Analysis of HB 337, Department of Financial Services, January 26, 2012, at 1 (on file with the Government Operations Subcommittee).

⁶² *Id.* at 2.

⁶³ *Id.* at 3.

⁶⁴ *Id.*